IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-1021

No. 77-

OVIDIO OMAR URDIALES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CASES

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To: The Honorable The Chief Justice of the United States and The Honorable Associate Justices of the Supreme Court of the United States.

The petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's judgment affirming the denial by the United States District Court for the Western District of Texas of the petitioner's motion to vacate sentence pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

There was no opinion by the United States District Court for the Western District of Texas in either the trial of the petitioner's underlying criminal case (SA-74-Cr.-217), or in the proceedings upon the petitioner's motion to vacate sentence pursuant to 28 U.S.C. § 2255.

(SA-76-CA-295). The direct appeal by petitioner from his conviction was affirmed by the United States Court of Appeals for the Fifth Circuit, with a written opinion. The opinion is reported at 523 F. 2d 1245,[1] and is in the Appendix. From the District Court's denial of his motion to vacate sentence, the petitioner made an appeal to the Fifth Circuit Court of Appeals. Upon the appeal, which affirmed the judgment of the District Court, the Circuit Court entered a written opinion. That opinion is found at 559 F. 2d 273 and is set forth in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was dated and entered on September 16, 1977. A timely petition for rehearing *en banc* was filed by the petitioner, and the same was denied by order of the court, which was filed and entered on October 19, 1977. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under 28 U.S.C. 2101(c).

QUESTION PRESENTED

Whether, that portion of 21 U.S.C. § 812(a) of the Controlled Substances Act that mandates that the Government republish the schedules of controlled substances at certain definite and specified intervals, which under the facts of this case meant that republication of heroin as a Schedule I Narcotic Drug had to occur within one year after March 30, 1973, but the Government did not republish the schedules until June 20, 1974, did not the Government's failure bring about the

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[1] Ceretiorari denied. 426 U.S. 920, 96 S. Ct. 2625, 49 L. Ed. 373 (1976).

result that the petitioner has been deprived of due process of law when he was convicted and sentenced for offenses under the Controlled Substances Act relating to heroin that took place on April 26, 1974 and on May 7, 1974.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private liberty be taken for public use, without just compensation.

United States Code

Certain provisions of the United States Code are involved in this case; but they are lengthy and are set forth in the Appendix. These provisions are:

Title 21, Section 811(a), (b), (c), (f) & (g)(1);

Title 21, Section 812(a), (b)[in part], (c)[in part];

Title 5, Section 552(a)(1);

Title 44, Section 1505(a), (b);

Title 44, Section 1507.

STATEMENT OF THE CASE

A. The Indictment

On September 11, 1974, a three count indictment was filed in the United States District Court for the Western District of Texas (San Antonio Division) against the petitioner, Ovidio Omar Urdiales, and two other persons, Billy Frank Alexander and Martin Castilleja Vega. (SA-74-C-217) The indictment charged violations of certain provisions of the Controlled Substances Act (21 U.S.C. § 801, et. seq.), and aiding and abetting (18 U.S.C. § 2). The indictment was based upon offenses arising from two alleged illegal distributions (sales) of heroin by the defendant Alexander to a Government agent that took place on April 26, 1974 and on May 7, 1974. In count one, the three defendants were charged under 21 U.S.C. § 846, in that during a period "beginning on or about April 26, 1974, and continuing until on or about May 7, 1974",[2] they conspired to illegally possess with intent to distribute approximately 267.8 grams of heroin, a Schedule I Narcotic Drug Controlled Substance, in violation of 21 U.S.C. § 841(a)(1). The heroin referred to in the count consisted of two separate quantities, one in the approximate amount of 22.74 grams and the other in the approximate amount of 245.09 grams. Counts two and three related further to these separate quantities. Count two, which was drawn in two paragraphs, first charged that on April 26, 1974, the defendant Alexander possessed with intent to distribute 22.74 grams of heroin, a Schedule I Narcotic Drug Controlled Substance, in violation of 21 U.S.C. § 841(a)(1); and in the second paragraph it was charged that the petitioner Urdiales aided and

[2] Indictment, Count 1.

abetted the offense committed by Alexander. Count three was also stated in two paragraphs: it first charged that on May 7, 1974, the defendant Alexander possessed with intent to distribute approximately 245.09 grams of heroin, a Schedule I Narcotic Drug Controlled Substance, in violation of 21 U.S.C. § 841(a)(1); and, additionally, in paragraph two of the count, the petitioner Urdiales was charged with aiding and abetting the commission of the offense.

B. The Trial

The case against the co-defendant Alexander was disposed of prior to trial by his plea of guilty. The petitioner Urdiales and the other co-defendant Vega were tried together on December 12, 1974. In the trial, which was by jury, the Government's evidence proved the heroin sales by Alexander to the Government agent on the dates of April 26, 1974, and on May 7, 1974. To establish the participation of the petitioner Urdiales in the offenses charged, the Government relied upon circumstantial evidence. The petitioner testified on his own behalf and called Alexander as his witness, who testified that the petitioner "played no role in the drug sales." 523 F. 2d at 1248. The petitioner was convicted on all three counts.[3] On January 20, 1975, the Court sentenced him to consecutive terms of ten years imprisonment on the conspiracy count (count one) and seven years on each count of aiding and abetting (counts two and three), making a total sentence of twenty-four years. The Court also imposed a special parole term of

[3] Co-defendant Vega, who was charged in Count 1 (conspiracy) and in Count 2 (aiding and abetting) was fully acquitted by the jury.

five years on each count to run consecutively and a total fine of $15,000.

C. The Appeal of the Conviction

A direct appeal from his conviction was made by the petitioner to the United States Court of Appeals for the Fifth Circuit. In his appeal, the petitioner raised issues relating to the Government's use of evidence of other offenses, the application of the co-conspirator exception to the hearsay rule, the Government's use of seized evidence, and the court's instructions to the jury concerning testimony of an alleged accomplice. Upon review, the Circuit Court affirmed the judgment of the District Court, *United States* v. *Urdiales,* 523 F. 2d 1245 (1975); and the Supreme Court denied his petition for writ of certiorari, 426 U.S. 920, 96 S. Ct. 2625, 49 L. Ed. 2d 373.

D. The Motion to Vacate Sentence

On September 30, 1976, the petitioner filed a motion in the trial court (United States District Court for the Western District of Texas, San Antonio Division) under 28 U.S.C. § 2255 to vacate the sentence imposed by the Court in his criminal trial. This proceeding was No. SA-76-CA-295. The motion attacked the Court's jurisdiction and was based on the facts that on April 26, 1974, and on May 7, 1974, the period of the alleged offenses of which he had been convicted, heroin was not a Schedule I Narcotic Drug Controlled Substance, because the Government had failed to republish the schedules for more than a year (having last republished them on March 30, 1973), despite the mandatory requirement of 21 U.S.C. § 812(a) that the schedules shall be republished in accordance with a timetable set forth

therein, which in no event allowed for the passage of more than one year before republishing. The District Court denied the motion on January 24, 1977. An appeal, noted on February 7, 1977, to the Circuit Court followed. On September 16, 1977, the Circuit Court affirmed the judgment of the District Court. *Urdiales* v. *United States,* 559 F. 2d 273 (5 Cir. 1977). A timely petition for rehearing, and for rehearing *en banc,* filed by the petitioner, was denied by the court on October 19, 1977.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. Introduction

By this petition, there is brought to the Court for review and determination, a question of no small seriousness, as to the interpretation of essential provisions, as to the interpretation of essential provisions of a major federal criminal statute. The question, or variants thereof, has been raised throughout the Circuits (as will be discussed herein). And, although the results have been uniform, the issue is recurrent. Every Circuit that has considered the matter, resolved it adversely to the petitioner's contention. The Circuit decisions that grappled with the problem in terms of the legislative history and principles of statutory construction, and these are the better reasoned cases, failed to give due consideration to the constitutional right involved. Due process of law is the value that was lost in the reasoning processes employed by the courts facing the question of whether an accused can be charged, tried and convicted of an offense that did not exist at the time of the conduct in question.

B. The Statutory Imperatives

We start with an overview of the key provisions of the principal statute involved in this case, with a brief sketch of the inter-relationship of these provisions. The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 et. seq. (commonly called the Controlled Substances Act) [4] established five schedules of drugs and controlled substances known as Schedules I, II, III, IV & V. In these schedules were listed the initial substances to be controlled. The narcotic drug, heroin, was listed in Schedule I. Section 812(b)(10). Section 812(c) of the Act provides that the five schedules "shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, chemical name or brand name designated . . ." Section 811 of the Act provides a procedure by which the Attorney General of the United States may by rule add to, transfer between the schedules, or remove any drug. Section 812(a) states:

> ". . . The schedules established by this section shall be updated and republished on a semi-annual basis during the two year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."

The date of enactment of the subchapter was October 27, 1970 (Pub. L. 91-513, Title 11, § 201, 84 Stat. 1245).

The only reference in the Act to the rulemaking functions of the Attorney General appears at § 811(a),

[4] The pertinent provisions of the Sections involved in this case (§ 811 & 812) are set forth in the Appendix.

which directs that the procedures prescribed by the Administrative Procedure Act be followed:

> "Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by Subchapter 11 of Chapter 5 of Title 5 . . . . (Section 811(a))

The provision of the Administrative Procedure Act that is pertinent to this discussion is found at Title 5 U.S.C. § 552(a)(1), which, in part provides as follows:

> "(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —
>
> . . .
>
> "(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency . . ."

Section 552(a)(1) contains another provision, which in the view of the petitioner, is not applicable or controlling in this case, but which is relevant to the later discussion.[5]

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Regis-

[5] Contrast the holding in the case of *Hotch* v. *United States*, 212 F. 2d 280, 14 Alaska 594 (9th Cir. 1954) with that of *United States* v. *Aarons*, 310 F. 2d 341 (2nd Cir. 1962).

ter when incorporated by reference therein with the approval of the Director of the Federal Register.

Provisions of the so-called Federal Register Act (Title 44 U.S.C. § 1505 et. seq.) are also implicated in this review of statutory provisions. Basically, the Act provides that certain documents or class of documents shall be published in the Federal Register and, included are those "that may be required so to be published by Acts of Congress" 44 U.S.C. § 1505(a)(3); as well as: "Documents authorized to be published by regulation. . . ." 44 U.S.C. § 1505 (b). By the further provisions of the Act, it is stated that:

> "A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been made available for public inspection as provided by section 1503 of this title . . . (44 U.S.C. § 1507)

From the foregoing review of the applicable statutes, the following summary can fairly be drawn:

1. The drug heroin was initially established by the Controlled Substances Act as a Schedule I drug (§ 812(b)(10)).

2. Heroin was to remain on the Schedule "unless and until amended pursuant to section 811." (§ 812(c))

3. Under Section 811(a), the Attorney General "may by rule remove any drug or other substance from the Schedule", provided he finds that it should not be included.

4. In the event that the Attorney General elects to exercise his rule making authority to exclude

a drug or substance from the schedule he must proceed in accordance with the requirements of the Administrative Procedure Act respecting notice, publication and hearing.

5. Before initiating proceedings called for in Section 811(a), the Attorney General must abide by the requirements of section 811(b) which require that he solicit from the Secretary of Health, Education and Welfare a medical and scientific evaluation and a recommendation as to whether to either control or decontrol a drug or substance, and this recommendation as to medical and scientific matters are binding as well as his recommendation that a drug or substance should not be controlled.

6. By virtue of the provisions of section 812(a) the schedules established by that section must be updated and republished at certain specified intervals.

7. By reference to the only part of the Act related to administrative proceedings, publication is to be in the Federal Register.

C. The Operative Facts

As noted hereinbefore, the date of enactment of the Controlled Substances Act was October 27, 1970. Pursuant to the mandate of 21 U.S.C. 812(a), the Attorney General (or his delegate) caused the schedule of controlled substances to be republished in the Federal Register on May 12, 1972 (37 Fed. Reg. 953), March 30, 1973 (38 Fed. Reg. 8254) and on June 20, 1974 (37 Fed. Reg. 22140).[6]

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[6] See, *United States* v. *Andrews*, 408 F. Supp. 1007, 1008, text and ft. nt. 1 (N. D. Calif. 1976). Some courts have taken the view that updated schedules of controlled substances were also republished annually in the Code of Federal Regulations beginning in 1972 (See: 21 C.F.R. § 308 for 1972 and 1973, and 21 C.F.R. § 1308 for 1974 and 1975); and that this publication satisfied the require-

The offenses that the petitioner stands convicted of (violation of 21 U.S.C. §§ 846, 841(a)(1) and 18 U.S.C. 2) arose from sales of heroin that took place on April 26, 1974, and May 7, 1974. The listing of heroin as a Schedule I Narcotic Drug Controlled Substance was an essential ingredient of the crimes and constituted the necessary basis for jurisdiction to charge or try him. There had been no republication of heroin as a scheduled narcotic drug as required by 21 U.S.C. § 812(a) for more than one year before his alleged criminal conduct.

D. Discussion

We now bring the law and the facts together, hopefully in a manner which compels recognition by this Court that the issue involved is of the significance and magnitude warranting review. The provisions of Section 812(a) that require republication of the schedules obviously means what it says. And though there are no

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ments of section 812(a). *United States* v. *Eddy,* 549 F. 2d 108, 112-113 (9th Cir. 1976); *United States* v. *Monroe,* 552 F. 2d 860, 862 (9th Cir. 1977), cert. denied —— U.S. ——, 97 S. Ct. 2936, —— L. Ed. 2d ——. But, the answer to this contention was provided by the Court in *United States* v. *Monroe,* 408 F. Supp. 270 (N. D. Calif. 1976), where in response to a Government argument along the same lines, the Court said, the position is "not convincing", in view of the fact that "it appears that the schedules automatically appear in the yearly reissue or reprint of the Code of Federal Regulations", rather than being published there as a conscientious Government effort to comply with section 812(a). 408 F. Supp. 275 (ft. nt. 10) To this can be added the observation that the provisions of the Administrative Procedure Act, referred to in the Controlled Substance Act as defining the Attorney General's rule making power, specifically denominates the Federal Register as the publication where documents required to be published by Act of Congress are to be printed. 44 U.S.C. § 1505(a)(3).

express sanctions, resort to case law establishes that where publication in the Federal Register is required by law and there is Governmental failure to do so, the result is that the adverse consequences are to be borne by the Government and not the citizen, nor the community. *United States* v. *Gavrilovic,* 551 F. 2d 1099 (8 Cir. 1977); *Borak* v. *Biddle,* 141 F. 2d 278, 78 U.S. App. D.C. 374 (D.C. Cir. 1944), cert. denied 323 U.S. 738, 65 S. Ct. 42, 89 L. Ed. 2d 591; *Hotch* v. *United States, supra,* 212 F. 2d 281 (9th Cir. 1954); *United States* v. *Morelock,* 124 F. Supp. 932, 944 (D. Md. 1954); *Pinkus* v. *Reilly,* 157 F. Supp. 548 (D. N.J. 1957); *Low* v. *Thomas,* 163 F. Supp. 945 (E.D. Pa. 1958); *Graham* v. *Lawrimore,* 185 F. Supp. 761, 763-764 (E.D. S.C. 1960), affd 287 F. 2d 207 (4 Cir. 1961); *Gardiner* v. *Tarr,* 343 F. Supp. 1120, 1127-1129 (N.D. Calif. 1972); *Northern California Power Agency* v. *Morton,* 396 F. Supp. 1187, 1191-1192 (D. D.C. 1975), affd 539 F. 2d 243, 176 U.S. App. D.C. 241 (1976).

In *Graham* v. *Lawrimore,* supra, the Court expressed the rule as follows:

> "While the Administrative Procedure Act (5 U.S.C.A. § 1003) and the Federal Register Act (44 U.S.C.A. § 307) are set up in terms of making information available to the public, the acts are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency or administrative rule has not been legally issued, and consequently it is ineffective. . . ." 185 F. Supp. 764.

The certain effect of the holdings in the above cases, applied to the instant facts, is that the statutory schedules defining controlled substances as set forth in 21 U.S.C. 812 were ineffective as of the dates of April 26, 1974, and May 7, 1974, because of the failure of the Government to republish the schedules as required by law.

An approach to the weighty problem of statutory application and interpretation posed by this case, which seeks to solve it by focusing on a construction of section 812(c) to the effect that the initial schedules shall stand until amended by section 811; and that that section provides elaborate proceedings for the removal of a drug or substance from the list, fails to take into account the obligatory language of 812.

The courts that have declined to credit contentions similar or akin to that of the petitioner have advanced myriad reasons. Many of them assert that a reading of sections 811 and 812 together reveals a Congressional intention which would be thwarted if the argument were accepted that during periods of lapsed republication of the schedules, the schedules were void. The holding in the case of *Thor* v. *United States,* 554 F. 2d 759, 762-763 (5 Cir. 1977) typifies this view. See also: *United States* v. *Huerta,* 547 F. 2d 545, 547 (10th Cir. 1977); *United States* v. *Eddy,* supra, *United States* v. *Rosa,* 562 F. 2d 205, 206 (2nd Cir. 1977); *United States* v. *Andrews,* supra. In *United States* v. *Kearney,* 560 F. 2d 1358 (9th Cir. 1977), it was held that the republication requirement was met by annual updated republication in the Code of Federal Regulations. 560 F. 2d 1368; and see also *United States* v. *Monroe,* 552 F. 2d 860, 862 (9 Cir. 1977). Other courts held that certain narcotic drugs such as heroin had been an illegal drug

since the inception of the Act and that the Attorney General's inaction could not terminate the schedule of published drugs. This could only occur through the mechanism established by section 811. *United States* v. *Monroe,* 408 F. Supp. 270, 274 (N.D. Calif. 1976). The republication requirement of section 812 has been held to be directory only, so that each schedule remains in effect until it is actually revised. *United States* v. *Bass,* 490 F. 2d 846, 858 (5 Cir. 1974); and see generally, *United States* v. *Hajal,* 555 F. 2d 558, 565-66 (6 Cir. 1977); *Lewis* v. *United States,* 555 F. 2d 1360, 1361 ft. nt. 2 (8 Cir. 1977).

An endless amount of time and space would be utilized if the effort were made to meet the expressions elaborated in these cases. Indeed, all the cases have not even been enumerated. The logic summoned by the petitioner to refute these holdings, is that section 812 clearly and distinctly requires the Government to republish the schedules and in failing to timely do so, it resulted in his having committed no cognizable offense on the dates set forth in the indictment. In *United States* v. *Gavrilovic,* supra, the Court spoke directly to this point:

> "It is a fundamental principle of law that "[n]o one can be criminally punished . . . except according to a law prescribed . . . by the sovereign authority before the imputed offense was committed, and which existed as a law at that time." *Kring* v. *Missouri,* 107 U.S. 221, 235, 2 S. Ct. 443, 455, 27 L. Ed. 506 (1882); and *Bouie* v. *City of Columbia,* 378 U.S. 347, 353-54, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)." 551 F. 2d 1103.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

UNITED STATES of America, *Plaintiff-Appellee,*

v.

Ovidio Omar URDIALES, *Defendant-Appellant.*

No. 75-1289

Nov. 24, 1975.

Rehearing and Rehearing En Banc Denied Feb. 23, 1976.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, and TUTTLE and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Defendant Ovidio Omar Urdiales, convicted on three narcotics counts under 21 U.S.C.A. §§ 841(a)(1) and 846 and 18 U.S.C.A. § 2, asserts the following errors on appeal; admission of prior offense evidence; admission of a co-conspirator's out-of-court hearsay statements; failure to acquit on insufficiency of evidence; admission of evidence produced by an alleged illegal search of defendant's automobile; failure to grant a mistrial because of the improper prejudicial testimony and questioning of Government witnesses; and improper charge to the jury as to an accomplice's testimony. We affirm.

The crimes charged were conspiracy and aiding and abetting a co-defendant's unlawful distribution of 22.7 and 245.09 grams of heroin. The two transactions occurred within a few days of each other at a club owned by defendant. The purchases were made by a Government agent from the co-defendant, an employee at defendant's club, who had pled guilty prior to trial.

Prior 1969 Heroin Offense

The most troublesome point on appeal concerns the introduction into evidence during defendant's cross-examination by the Government of a 1969 narcotics transaction. No conviction had been obtained as a result of this prior transaction, the charges having been dismissed upon completion of the defendant's agreement to cooperate with the Government in obtaining the conviction of a prime target. The defendant contends his involvement with heroin in 1969 was improperly admitted to prove intent for two reasons: *first*, intent, although a material element of the crime charged, was not a genuine issue in the case, and *second*, the use of the prior transaction to prove intent violated the terms of a pretrial omnibus agreement.

The defendant concedes that, contrary to the general rule prohibiting evidence of separate criminal transactions, use of other offenses is permitted for the purpose of establishing intent. Relying on cases such as *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975), however, he contends that other offenses are admissible under this exception only when intent is a genuinely contested issue in the case.

A series of Fifth Circuit cases has developed the law concerning the "intent" exception to the general rule. *E. g., United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974); *United States v. Goodwin*, 492 F.2d 1141 (5th Cir. 1974); *United States v. Martinez*, 466 F.2d 679 (5th Cir. 1972), *reh. denied*, 481 F.2d 896 (5th Cir.), *cert. denied*, 414 U.S. 1065, 94 S.Ct. 571, 38 L.Ed.2d 469 (1973); *Matthews v. United States*, 407 F.2d 1371 (5th Cir. 1969), *cert. denied*, 398 U.S. 968, 90 S.Ct. 2177, 26 L.Ed.2d 554 (1970); *Baker v. United States*, 227 F.2d 376 (5th Cir. 1955); *Weiss v. United States*, 122 F.2d 675 (5th Cir.), *cert. denied*, 314 U.S. 687, 61 S.Ct. 300, 86 L.Ed. 550 (1941). Synoptically, the prerequisites needed for application of the exception are fourfold: (1) plain, clear and convincing evidence of a prior similar offense, (2) not too remote in time, (3) in which intent is a material element, and (4) the proof of which is substantially needed by the Government to the extent that material prejudice to the defendant is outweighed. The prior offense introduced in this case, substantially similar to the offenses for which defendant was on trial, satisfies these requirements and was properly held admissible. *See*, in addition to those cases cited previously, *United States v. Simmons*, 503 F.2d 831 (5th Cir. 1974); *United States v. Cavallino*, 498 F.2d 1200 (5th Cir. 1974); *United States v. Arias-Diaz*, 497 F.2d 165 (5th Cir. 1974); *United States v. Fonseca*, 490 F.2d 464 (5th Cir.), *cert. denied*, 419 U.S. 1072, 95 S.Ct. 660, 42 L.Ed.2d 668 (1974).

We need not rule here on whether a plea of "not guilty" would put intent sufficiently in issue to support admission of the evidence in the Government's case in chief. Unlike the Sixth Circuit's decision in *United States v. Ring, supra*, and cases cited therein, where the prior offenses were proved in the Government's case in chief, the defendant here had taken the stand, admitted his presence at the scene of the transaction, but generally denied his involvement. This denial carried with it a denial of intent to be involved. No cases cited support defendant's contention that the kind of defense asserted in this case removed intent as a material issue to the point where the prior transaction "intent" exception should not apply.

On objection to the admission of the evidence in the trial court, the defendant did not assert a violation of the pretrial omnibus agreement, a point he vigorously argues on appeal. We believe that this is the kind of argument that must be specifically asserted before the trial court to be reviewable on appeal. *See* F.R.Crim.P. 51; *cf. United States v. Anderson*, 471 F.2d 201, 203 (5th Cir. 1973). Even assuming the defendant's interpretation of the omnibus agreement would have been upheld by the district court if asserted at trial, other measures could then have been taken to protect both the Government's evidentiary rights and

the defendant's problem of surprise and could have eliminated the necessity of a retrial. *See generally* 3 Wright, *Federal Practice & Procedure (Criminal)* § 842 (1969). Under such circumstances, we find no reversible error in the admission of the evidence and no cause to consider the application of *United States v. Scanland*, 495 F.2d 1104 (5th Cir. 1974).

Co-Conspirator's Hearsay

Hearsay statements made to a Government agent by a co-conspirator are properly admissible if the prosecution proves the conspiracy's existence by independent evidence. *Glasser v. United States*, 315 U.S. 60, 74, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Oliva*, 497 F.2d 130, 132-133 (5th Cir. 1974). We believe the evidence in this case was sufficient to show existence of the conspiracy independent of the hearsay statements. The Government agent had questioned defendant moments before the first heroin transaction as to whether everything was ready. Urdiales replied that "everything is ready, go in and talk to Alex." Defendant was present at the club during the entire transaction, and even gestured in an affirmative manner in response to the agent's visual inquiries when the heroin pick-up was made. During the second transaction, defendant's actions in reference to the co-conspirator's concomitant movements in and out of the club, and the discovery of the money beneath the floor mat of the defendant's car, further support the conspiracy's existence apart from the implicating remarks.

Sufficiency of the Evidence

A review of the record reveals that the evidence, though circumstantial, as sufficient when viewed in the light most favorable to the jury verdict to support a finding beyond a reasonable doubt that a conspiracy did exist. *See Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457 (1942).

Automobile Search

Defendant contests the admission into evidence of $3,000 found by a Government agent who noticed through the car window a distinctive bulge under the floor mat of defendant's car. The evidence withstands the illegal search challenge under the principles of *Chambers v. Maroney*, 399 U.S. 42, 46-52, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Although the car was not being driven, it was in the process of being towed away. Immediate action by the officer was justified. The agent had seen the defendant with the car on a prior occasion. The automobile, found in a parking lot behind a bus station, had earlier in the day been parked across from the club owned by Urdiales, the scene of the two transactions. Although no agent saw defendant move the car, it had indisputably been moved between the time the defendant had entered and left the club until he was arrested inside the bus station, a period of only a few minutes. The agent testified that he knew of the missing $3,000 even before the car was searched. Under these exigent circumstances, there is no merit to defendant's contention that a search warrant should have been obtained.

Jury Charge

The judge charged that:

> An alleged accomplice does not become incompetent as a witness merely because of participation with others in the criminal act charged. However, the jury should keep in mind that the testimony of an alleged accomplice, if you decide he was an accomplice, should be closely examined, received with caution and weighed with great care.

The accomplice had testified, contrary to his earlier hearsay statements, that defendant played no role in the drug deals. This Court in *United States v. Nolte*, 440 F.2d 1124,

1126 (5th Cir.), *cert. denied,* 404 U.S. 862, 92 S.Ct. 49, 30 L.Ed.2d 106 (1971), stamped its imprimatur on a similar jury charge where an accomplice had exculpatorily testified for the defense. The Supreme Court in *Cool v. United States,* 409 U.S. 100, 103, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972), cited *Nolte* with approval. The instant case does not concern a charge which predicated the jury's acceptance of the testimony on finding it true beyond a reasonable doubt, as in *Cool.* Here the charge concerned only the weight to be accorded the evidence, a practice recognized as proper by *Cool.*

Harmless Error

The testimony received from a Government agent concerning defendant's reputation in heroin traffic and the prosecutor's reference to defendant's attempt at bargaining with the Government after "the case was made," did not constitute reversible error under the circumstances of this case. At best, they only rise to the level of harmless error. *See* F.R.Crim.P. 52(a).

Affirmed.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Ovidio Omar URDIALES, *Petitioner-Appellant,*

v.

UNITED STATES of America, *Respondent-Appellee.*

No. 77-1507
Summary Calendar.*

Sept. 16, 1977.

Appeal from the United States District Court for the Wsetern District of Texas.

Before BROWN, Chief Judge, and RONEY and HILL, Circuit Judges.

PER CURIAM:

This is an appeal from the denial of a motion to vacate filed pursuant to 28 U.S.C. § 2255. Urdiales' conviction on direct appeal was affirmed. *United States v. Urdiales,* 5 Cir., 1975, 523 F.2d 1245, *cert. denied,* 1976, 426 U.S. 920, 96 S.Ct. 2625, 49 L.Ed.2d 373. Appellant's sole contention is that his convictions for narcotics offenses are invalid because the acts on which they are based took place at times when the Government had not republished the list of controlled substances as required by 21 U.S.C.A. § 812(a). We recently held this contention to be meritless. *Thor v. United States,* 5 Cir., 1977, 554 F.2d 759 [1977].

AFFIRMED.

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.,* 5 Cir. 1970, 431 F.2d 409, Part I.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

October 19, 1977

EDWARD W. WADSWORTH
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

To All Parties Listed Below:

No. 77-1507—Ovidio Omar Urdiales v. U.S.A.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth, Clerk
/s/ By Brenda M. Hauck
Deputy Clerk

**on behalf of appellant, Oviodio Omar Urdiales,

cc: Mr. Thomas M. Dawson
Ms. LeRoy Morgan Jahn

United States Code

Title 21 § 811

(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules and drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

(b) The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and

medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation of recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

(c) In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

. . .

(f) If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

(g) (1) The Attorney General shall by regulation exclude any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription.

. . .

Pub. L. 91-513, Title 11, § 201, Oct. 27, 1970, 84 Stat. 1245.

Title 21 § 812

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

(b) Except where control is required by United States obligations under an international treaty, convention, or

protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. . . .

. . .

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

. . .

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation:

. . .

(10) Heroin.

. . .

Title 5 § 552

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

. . .

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.

Title 44 § 1505

(a) Proclamations and Executive Orders; documents having general applicability and legal effect; documents required to be published by Congress. There shall be published in the Federal Register—

(1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies

or persons in their capacity as officers, agents, or employees thereof;

(2) documents or classes of documents that the President may determine from time to time have general applicability and legal effect; and

(3) documents or classes of documents that may be required so to be published by Act of Congress.

For the purpose of this chapter every document or order which prescribes a penalty has general applicabiilty and legal effect.

(b) Documents authorized to be published by regulations; comments and news items excluded. In addition to the foregoing there shall also be published in the Federal Register other documents or classes of documents authorized to be published by regulations prescribed under this chapter with the approval of the President, but comments or news items of any character may not be published in the Federal Register.

. . .

Title 44 § 1507

A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it. The publication in the Federal Register of a document creates a rebuttable presumption—

(1) that it was duly issued, prescribed, or promulgated;

(2) that it was filed with the Office of the Federal Register and made available for public inspection at the day and hour stated in the printed notation;

(3) that the copy contained in the Federal Register is a true copy of the original; and

(4) that all requirements of this chapter and the regulations prescribed under it relative to the document have been complied with.

The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.

Pub.L. 90-620, Oct. 22, 1968, 82 Stat. 1276.